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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

ROY CONDY WOODS,
Petitioner,

v

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Roy Condy Woods, by and through his attorney, N. C. Deday LaRene, petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Sixth Circuit affirming his conviction of Counts I and II of a Four Count Indictment, while

vacating his sentence under Count II, and the conviction and sentence under Counts III and IV, and denying Petitioner's subsequent Petition for Rehearing, requesting the vacation of his convictions on Counts I and II, all of which involve alleged violations of 18 USC §841(a) (1).

OPINION BELOW

The principal Opinion of the Sixth Circuit Court of Appeals was decided and filed January 18, 1978, and has not to date been reported to Petitioner's knowledge, and is reprinted in full as Appendix A hereto; the Order of the Sixth Circuit Court of Appeals filed February 15, 1978, denying Petitioner's Petition for Rehearing is appended hereto as Appendix B.

JURISDICTION

The Order of the Sixth Circuit Court of Appeals of February 15, 1978 denied the specific relief prayed for in this Petition for Certiorari. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTION PRESENTED

Is the prejudice inherent in a multiplicitous Indictment such that it is improper to require a defendant to stand trial under such an Indictment, or to refuse to vacate any conviction and sentence thereunder, and require trial to proceed upon a properly drawn Indictment?

STATEMENT OF THE CASE

Petitioner, Roy Condy Woods, was charged, along with another, in a Four Count Indictment charging, in Count I delivery of a quantity of heroin, Count II possession with intent to deliver that same quantity of heroin, and, in Counts III and IV, possession with intent to deliver different quantities of heroin.

The facts adduced at trial showed, essentially, that Woods was driving an automobile in which his co-defendant arrived to consummate a sale of narcotics. After the co-defendant delivered the quantity of heroin (the subject matter of Counts I and II) to a person who turned out to be an undercover agent, he was arrested, as was the Petitioner. In the vehicle which the Petitioner was driving were found separate caches of heroin. Under the front seat were found two packages weighing 114 and 107 grams respectively; in the trunk were found two packages weighing 28 and 54 grams respectively. The heroin described in Count III of the Indictment more or less corresponded in quantity to one of the two parcels found under the front seat, and the heroin described in Count IV of the Indictment more or less corresponded to the total of the two parcels of heroin found in the trunk.

Prior to trial, motions to dismiss or compel an election were filed alleging the multiplicitousness of the various Counts of the Indictment and, during the trial, in the form of a Motion for Judgment of Acquittal, the multipliciousness of the Indictment was again urged.

The Sixth Circuit Court of Appeals held that the Indictment was indeed multiplicitous in charging the three quantities of heroin, simultaneously possessed,

and with an apparently unitary purpose, as three separate counts. It further found, as a matter of statutory construction, that it would be improper to allow multiple sentences for possession with intent to deliver and delivery of the same quantity of heroin. Accordingly, it remanded the case to the District Court affirming the defendant's convictions under Counts I and II of the Indictment, but with instructions to vacate the sentence as to Count II, and to vacate the conviction and sentence under Counts III and IV.

Arguing that the question was not one of multiple punishment, but rather of multiple prosecution, Petitioner moved for a rehearing solely on the question of whether, the Court of Appeals having properly found the Indictment to be multiplicitous, it should not have vacated the Petitioner's conviction on all Counts, and required the Government to put him on trial on a properly drawn Indictment. The Sixth Circuit denied the Petition for Rehearing.

REASONS FOR GRANTING THE WRIT

THE DECISION OF THE SIXTH CIRCUIT COURT OF APPEALS FAILS TO RECOGNIZE THE POTENTIAL FOR PREJUDICE INHERENT IN ALLOWING A DEFENDANT TO STAND TRIAL ON A MULTIPLICITOUS INDICTMENT, AND BESPEAKS A NEED FOR GUIDANCE FROM THIS COURT AS TO THE PROPER REMEDY TO BE APPLIED WHEN MULTIPLICITY IS FOUND IN AN INDICTMENT.

The instant case presents a difficulty which arises with great frequency in the context of controlled substance prosecutions. It is certainly the practice in Petitioner's district, and appears to be the practice

elsewhere, for Indictments to be drawn much as the one in the case at bar was drawn. The Indictment is multiplicitous in two respects: (1) it charges two separate offenses in the possession with intent to distribute and distribution of the same quantity of heroin, and (2) it charges separately the possession of several packages of the same substance at the same time and locale merely because the three packages were physically located in different places, although the apparent intent of the possessor was the same with respect to the disposition of each of the portions.

With respect to the question of charging possession with intent to deliver and delivery of the same substance, in a single series of acts, the Sixth Circuit agreed that as a matter of statutory interpretation it would be improper to sentence separately, and in so doing it followed a line of cases initiated in that circuit with *United States v. Stephens*, 521 F2d 334 (CA 6 1975). However, the Court erred in holding that the question involved was one of multiple sentence, not multiple prosecution.

The distinction between prejudice resulting from multiple punishment and the danger inherent in multiple prosecutions during trial is apparent. In *United States v. Ketchum*, 320 F2d 3 (CA 2 1963), the Second Circuit commented upon that distinction. The Court, quoting from an Opinion from Judge Wyzanski in *United States v. Mamber*, 127 F Supp 925 (D Mass 1955), stated:

> The basis for requiring even an election among Counts is not at all that the defendant may otherwise face multiple sentences. Decision as to the unit of punishment is not controlled by the form of the Indictment; . . . the reasons for

> requiring the Government to elect among Counts in some cases are, rather, primarily those of promoting the order and efficiency of the trial and avoiding the risk that "the prolix pleading may have some psychological effect upon a jury by suggesting to it that defendant has committed not one but several crimes." 320 F2d *supra* at 8.

Some of the lower Federal Courts, recognizing the prejudicial effect that a multi-count Indictment may have upon a jury, have required pre-trial election in situations similar to that posed by the dual charging practice presented by Counts I and II of the instant Indictment. *See, e.g., United States v. Nichols*, 401 F Supp 1377 (ED Mich 1975).

The statute, 21 USC §841(a) (1), defines both the offense of distribution and possession with intent to distribute in a single sub-paragraph. Whether this sub-paragraph defines several crimes, or but a single crime which may be violated in more than one way is, of course, at bottom a question of statutory interpretation. The Court of Appeals apparently has determined that it creates but a single crime which may be violated in several ways, or at least defines several distinct classes of violators.

In so doing it relied heavily upon this Court's analysis in *Milanovich v. United States*, 365 US 551 (1961), in which this Court held that a person could not be convicted for both stealing from a federal institution and receiving and concealing the proceeds of the theft. It should be noted that the remedy accorded by this Court upon a finding of multiplicity was not vacation of sentence but, rather, vacation of the multiplicitous

conviction. Although the Court did not speak directly to its reasons for according this form of relief, it seems not unreasonable to infer that the Court was considering the potential for prejudice.

Indeed, even allowing a conviction for both distribution and the incidental possession of the same quantity of contraband harbors the potential for collateral sentence-related prejudice to a defendant. As Judge (now Solicitor General) McCree wrote, concurring in *United States v. King*, 521 F2d 356 (CA 6 1975):

> Simply vacating one of the sentences is not adequate. Further, failing to reverse the improper second conviction may later expose the defendant to additional punishment under an habitual offender statute. This result would clearly be contrary not only to the rationale of *Bell* [*Bell v. United States*, 349 US 81 (1955)] but also the concern of the majority in this appeal to avoid multiple punishment. 521 F2d at 359.

But concern for multiple punishment where only one offense may properly lie, cannot be seen as a complete response to the problem posed by a multiplicitous Indictment. As this Court wrote in *Milanovich v. United States*, 365 US *supra* 551 at 555 (1961):

> [T]here is no way of knowing whether a properly instructed jury would have found the wife guilty of larceny or of receiving (or, conceivably, of neither).

There is, simply, no way to know how a properly instructed jury in the case at bar would have decided the case, and whether such a jury would have found the Petitioner guilty of Counts I, II, III, or IV, or, conceivably, of neither, and it was simply impossible to properly instruct a jury on the basis of an improperly drawn indictment.

The jury in the case at bar was permitted to deliberate on a prolix Indictment; it was instructed that it might find the defendant guilty of all three of the possession with intent to distribute counts, and as well guilty of the delivery count. In this, obviously, the jury was improperly charged.

As in any case where an improper instruction goes to the very heart of the integrity of the accusatory process (here, quite simply, whether the defendant could be found guilty of the offenses charged), the obvious remedy is the vacation of a resulting conviction.

Thus, it is the position of the Petitioner herein that the Court of Appeals erred not only in refusing to vacate the conviction on Count II (which the Court found offered only the difficulty of multiple punishment), but, perhaps more significantly, in refusing to vacate the conviction on Count I which the Court found to be improperly multiplied by the very act of charging Counts III and IV (which convictions were in fact vacated).

There is no question but that the Petitioner in the instant case did not sleep on his rights. Prior to trial, he moved to compel an election. During trial, he moved again to compel an election, at the close of the Government's proofs. He further asked that the jury be instructed that they could not find him guilty of all of the Counts, and objected to the Court's refusal to give such an instruction.

Although Petitioner cannot point to any specific indicia of prejudice, and although the Court may harbor the suspicion that the extent of such prejudice involved in the situation posed in the case at bar may be slight, since we cannot *know*, and since the

Petitioner has assiduously asserted his rights in the premises, and vigorously argued the impropriety in the manner in which the Indictment was drawn, it seems manifestly unfair to deny him complete relief from the wrong complained of, and, indeed, found by the Court of Appeals. Even if the possibility of prejudice is small, there is simply no countervailing justification for allowing such prejudice, however slight, to inure to a defendant who, at each point in the proceedings, urges the impropriety which is ultimately vindicated on appeal.

The only way that such rights can be adequately protected is to apply prophylactic remedies to protect fragile liberties.

Perhaps more significant in the context of this Petition for Certiorari is the observation that both trial courts and the various circuits are virtually without guidance from this Court both as to the underlying question of statutory interpretation and as to the further question of what remedy should be employed (a compelled election? vacation of sentence only?) when multiplicity in Indictments, such as the one in the instant case, is found.

The Court has at various times, having found multiplicity in the Indictment in the context of various statutes, responded by simply vacating sentences (see, e.g., *Prince v. United States*, 352 US 322 (1957), vacating all convictions (*Milanovich v. United States*, 365 US 551 (1961)) and in another instance, apparently vacating one of the convictions (*Bell v. United States*, 349 US 81 (1955)). With these parallel lines of authority with respect to proper remedial action in existence, both trial and appellate courts are without decisional foundations

to which they may anchor themselves in deciding the variety of questions which arise in the interpretation of this active area of federal criminal law.

If, for no other reason than this, this Court should grant the within Petition for Certiorari and exercise its supervisory powers to give the needed guidance in the premises.

CONCLUSION

It is therefore respectfully submitted that this Court should grant the Petition for a Writ of Certiorari to review the important questions posed by the case at bar.

Respectfully submitted,

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STATUTE INVOLVED

Title 21 United States Code, §841(a) (1) provides, in pertinent part:

> (a) except as authorized by this sub-chapter, it shall be unlawful for any person knowingly or intentionally —
>
> > (1) to manufacture, distribute or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance;

APPENDIX A

DECISION OF THE COURT OF APPEALS

(United States Court of Appeals — Sixth Circuit)
(U.S.A. v. Roy Condy Woods — No. 77-5100)

(Decided and Filed January 18, 1978)

Before: Phillips, Chief Judge; Engel, Circuit Judge, and Lambros, District Judge.*

Engel, Circuit Judge. Defendant Roy Condy Woods was found guilty in a district court jury trial on four separate counts of an indictment charging violations of the narcotics laws. All violations were alleged to have occurred "on or about November 12, 1975, in the Eastern District of Michigan, Southern Division." All involved heroin.

Count 1 charged that Woods, with co-defendants Dale Schnell and Eddie Ray Snyder, possessed with an intent to distribute and aided and abetted each other in the possession with intent to distribute approximately 111.36 grams of heroin, in violation of 21 U.S.C. §841(a) (1) and 18 U.S.C. §2.

Count 2 charged that Woods, Schnell and Snyder unlawfully distributed and aided and abetted each other in the distribution of 111.36 grams of heroin, in violation of 21 U.S.C. §841(a) (1) and 18 U.S.C. §2.

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* Hon. Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

Count 3 charged that Woods, Schnell and Snyder unlawfully possessed with intent to distribute approximately 115.37 grams of heroin, contrary to the statutes cited, and finally,

Count 4 charged that Woods, Schnell and Snyder unlawfully possessed with intent to distribute approximately 95.34 grams of heroin, in violation of those same cited statutes.

Woods was arrested by narcotics agents at the Hilton Inn near the Detroit Metropolitan Airport, and a search of the red Opel automobile which he had driven to the Hilton revealed caches of heroin both under the front seat and in the trunk of the automobile. In addition, the narcotics officers had earlier obtained possession of another cache of heroin delivered to them by Dale Schnell as the first of two packages which the latter had agreed to sell to the undercover agents. The proofs showed that the 111.36 grams of heroin described by weight in count 1 of the indictment was that which was sold by Schnell to the undercover government agents and was thus the same heroin described in count 2. The heroin described in count 3 of the indictment more or less corresponded in weight to one of two parcels found under the front seat of the Opel, weighing 114.55 grams and 107.26 grams respectively. The two caches of heroin discovered in the trunk of the Opel weighed 28.527 and 54.97 grams respectively, or a total of approximately 86 grams, which roughly approximates the weight of the heroin described in count 4. In terms of purity, the heroin in counts 1 and 2 was 19% pure; the heroin in count 3 was 19.3% pure with respect to the 114.55 grams and 19.8% pure with respect to the 107.26 grams. The 28.527 gram packet found in the trunk was 16.1% pure, while the other 54.97 gram packet had a purity of 18.7%.

Following a jury trial, Woods was convicted of all four counts and sentenced to seven years plus a special parole term of three years on each of the four counts, the sentences to run concurrently. With respect to counts 1 and 2, which the evidence showed to have arisen out of a single transaction, the district judge appears to have been aware of our decision in *United States v. Stevens*, 521 F.2d 334 (6th Cir. 1975), but gave no explanation for the failure to apply it. Upon appeal no good reason is shown why *United States v. Stevens* should not compel the vacation of one of the two concurrent sentences imposed in counts 1 and 2.

Prior to trial Woods moved the court to compel the prosecution to elect between counts 1 and 2. Woods contends that the trial court erred in denying his motion and thus urges that we should not simply vacate one of the two sentences but should vacate as well one of the judgments of conviction. As authority, the defendant relies upon *United States v. Nichols*, 401 F. Supp. 1377 (E.D. Mich. 1975). Following a timely motion in advance of trial, the district court in *Nichols* ordered the government before trial to elect between two counts charging distribution and possession with intent to distribute. In so ruling, the district court observed:

> While it is true that the United States Court of Appeals for the Sixth Circuit in *Stevens* permitted the underlying conviction to stand, reversal thereof not having been considered necessary in order to render their prejudicial effect harmless, we are presented in the instant case with a different stage of the proceedings. Where conviction has not yet occurred, it would

> be contrary to the spirit of *Stevens* to permit multiple prosecution where Congress intended but a single punishment for a single criminal act . . . .

401 F. Supp. at 1382.

The conclusion reached in *Nichols* is not one which necessarily follows from our decision in *Stevens*. While it is true that a simple possession charge is a lesser and included offense of a charge of possession with intent to distribute, *United States v. Wade*, 502 F.2d 144 (6th Cir. 1974), the same cannot be said of the offenses of distribution and possession with intent to distribute.

> Here, both distribution and possession with intent to distribute are subject to maximum fifteen year penalties. Hence, one cannot be said to be lesser and included within the other in the usual sense. The possession with intent charge can be proved without proof of actual distribution and the distribution charge can conceivably be proved without proof of possession. Thus two offenses can exist, for each provision requires proof of a fact which the other does not. *Blockburger v. United States*, 284 U.S. 299, 52 S. Ct. 180, 76 L.Ed. 306 (1932); *Gavieres v. United States*, 220 U.S. 338, 31 S. Ct. 421, 55 L.Ed. 489 (1911).

United States v. Stevens, 521 F.2d at 337 n. 2.

Whatever might be the result of a government appeal from a forced election of counts before trial, an issue not present here, no more than the vacation of one of the sentences is required under *Stevens*, and we deem it immaterial that Woods may have made a timely but unsuccessful effort to compel the government to elect before trial.

A more difficult question is whether counts 1, 3 and 4 are, as contended by appellant, multiplicitous, thereby precluding separate convictions and sentences.

The government points to the fact that the caches and parcels of heroin described in counts 1, 3 and 4 had a separate identity and were found in three separate locations, although all were at least in the constructive possession of Woods.

It is axiomatic that to be found guilty of possession of heroin with intent to distribute in contravention of 21 U.S.C. §841(a)(1), the evidence at trial need not establish the precise amount of heroin alleged in the indictment. It is sufficient if the substance was in fact heroin and if it is measurable. *E.g. United States v. Sims*, 529 F.2d 10 (8th Cir. 1976); *United States v. Jeffers*, 524 F.2d 253 (7th Cir. 1975); *United States v. Nelson*, 499 F.2d 965 (8th Cir. 1974). Nor need the precise percentage of purity thereof be shown.

The counts of the indictment here do not identify the heroin other than by its weight, and there is a substantial variation in weight between the parcels described in counts 3 and 4 and those proven at trial to have been found underneath the front seat of the Opel and in the trunk. The counts do not further identify the specific cache of heroin by percentage of purity.

The difficulty of identifying the specific heroin with one of several counts against the same defendant without incorporating into the language of the count any more specific identifying information is apparent. Proof that the defendant possessed any one of the five parcels of heroin seized would suffice to sustain a conviction under any of the three counts. Was the heroin described in count 3 in fact that which was recovered

from the front seat, or was it that which was recovered from the trunk? What would happen if the proofs at trial showed each separate package to be identical in weight to the others? What would be the result should it have been determined, for example, that the heroin found in the trunk of the car had been seized in violation of the defendant's Fourth Amendment rights, thus making it inadmissible? Which count would be then affected?

Conversely it can be asked what would have been the result had counts 3 and 4 never been returned by the grand jury and the case gone to trial solely on counts 1 and 2? If Woods were shown, in fact, to have possessed the heroin found in all three locations, would it all have been admissible as proof of his possession under count 1? Would not the government's proof that he was in possession of any one of the three quantities of heroin have been sufficient to support his conviction under count 1, any variance in the weight between that described in the count and that introduced into evidence being immaterial? If this were so, how then could he have been charged with several separate but simultaneous acts of possession?

The foregoing illustrates, we think, that defendant's claim of multiplicity may, indeed, have merit.

The government relies for its claim that the counts are not multiplicitous upon *United States v. Privett*, 443 F.2d 528 (9th Cir. 1971). While there the charge in counts 2, 3 and 4 of the indictment was receiving, concealing and facilitating the concealment and transportation of heroin in separate amounts and percentages of purity described in each count, the facts are otherwise identical. The Ninth Circuit held that the counts stated three separate offenses:

> Different facts as to the purity of the heroin and its location were involved in each of the counts. Different acts of the appellant were involved in each count. Since different proof was required as to each of the three counts on the charge of receiving, concealing and facilitating the concealment and transportation of different batches of heroin, the three counts stated separate offenses.

United States v. Privett, 443 F.2d at 531.

The Ninth Circuit cited no authority for the foregoing proposition but reinforced its conclusion by observing that it was not in any event required to examine the validity of more than one of the counts under the concurrent sentence doctrine of *Hirabayashi v. United States*, 320 U.S. 81 (1943).

Surprisingly, we have been unable to find any authority bearing directly upon the claim of multiplicity as applied in cases of possession of controlled substances with intent to distribute them. *See generally United States v. Williams*, 480 F.2d 1204 (6th Cir. 1973). However, we find guidance in the reasoning of Judge Weick's opinion in *United States v. Jones* 533 F.2d 1387 (6th Cir. 1976), *cert. denied*, 97 S. Ct. 2919 (1977). Jones was convicted and sentenced on counts 1, 3 and 5 of an indictment which charged him with possession of a revolver on three separate occasions, once on the occasion of his purchase of the weapon on October 15, 1970, a second time when he was stopped by police officers during a driver's license check the following March and the third time in December, 1973 when police officers were executing a warrant for the search of his liquor store. In holding that only a single offense

was intended, Judge Weick looked to the statute and its history and concluded that the congressional intent was at best ambiguous, especially where there was no proof that there was any interruption of Jones' possession of the weapon from the time it was first sold to him in October, 1970, until it was seized from his store in December, 1973. While the facts in *Jones* appear readily distinguishable from those here, we believe it is instructive that Judge Weick relied heavily upon the more nearly analogous facts and reasoning of *Crepps v. Durden*, 2 Cowp. 640, 98 Eng. Rep. 1283 (K.B. 1777), in which Lord Mansfield held that a baker could lawfully be convicted but once of violation of a statute prohibiting the practice of one's trade on the Lord's Day, even though it might have been charged that he baked several loaves of bread or worked several hours on that Sunday. Judge Weick observed:

> Possession is a course of conduct, not an act; by prohibiting possession Congress intended to punish as one offense all of the acts of dominion which demonstrate a continuing possessory interest in a firearm. If Congress had wished to punish each act of dominion it could have done so easily by forbidding the acts of dominion instead of the course of conduct. In fact, Congress did declare the possessory acts of receiving and transporting firearms to be illegal, but Jones was not charged with performing such acts.

United States v. Jones, supra, 533 F.2d at 1391.

We recognize, of course, that the congressional history and legislative purpose behind criminal laws may vary from law to law and we do not doubt that Congress could in its wisdom so define the crimes as to

create entirely separate and punishable offenses under the facts here. We recognize further that Congress, in enacting the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. §801 *et seq*, and subsequent amendments, was no doubt intent upon strengthening the enforcement of existing drug laws. H. Rep. No. 91-1444, 91st Cong., 2d Sess. (1970), *reprinted in 3 U.S. Code Cong. & Admin. News* 4566, 4567 (1970). However, as long as the statute does not graduate the gravity of the crime of possession of heroin by the quantity possessed, we see no indication that Congress intended to permit a multiplication of the offenses of possession at any given time by a defendant upon evidence that the heroin may merely have been separately packaged or stashed.[1] *See United States v. Williams*, 480 F.2d 1204, 1205 (6th Cir. 1973). That the

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[1] *Gore v. United States*, 357 U.S. 386 (1958), relied upon by the government, is inapposite. In *Gore*, the issue was whether a single narcotics sale could give rise to convictions for violating three different statutory provisions. In sustaining the convictions, the Court reaffirmed the rule of *Blockburger v. United States*, 284 U.S. 299 (1932), which, as noted above, provides that two offenses can derive from the same act if each provision requires proof of a fact which the other does not. *See generally* 1 C Wright, Federal Practice and Procedure §142 (1969).

Here we are not concerned with whether a single act violates a multiplicity of statutes as in *Gore* and *Blockburger*. Rather, we face what the Supreme Court has recognized to be a different issue: whether a course of conduct — here, possession with intent to distribute — can result in multiple violations of the same statute. *Gore, supra*, 357 U.S. at 391; *United Staates v. Universal C.I.T. Credit Corp.*, 344 U.S. 218 (1952). Our court has held that the "same facts" test in *Blockburger* is inapplicable to offenses charging a course of conduct, at least where Congress has not indicated the appropriate unit of prosecution. *Jones, supra*, 533 F.2d at 1391-92. *But cf. United States v. Agy*, 374 F.2d 94, 95 (6th Cir) (per curiam) *cert. denied*, 389 U.S. 881 (1967).

government might have been able under one count or any one of the three counts to have obtained a conviction by proof of the defendant's possession on the date in question of any one of the separate parcels of heroin is in our view a fully adequate assurance that the government's dragnet against dope peddlers is comprehensive and effective. Furthermore, there is ample leeway in the sentencing potentialities for but one conviction to take into account the overall amounts of heroin involved in the crime.

Appellant raises numerous other issues, none of which merits extended discussion. The facts known to the arresting officer provided ample probable cause to arrest Woods. The district judge properly found in *United States v. Upthegrove*, 504 F.2d 682 (6th Cir. 1974), ample authority for the propriety of the warrantless search of the Opel and seizure of the evidence found in it under the exigent circumstances which existed in the motel parking lot. The competence of the drug enforcement agent to testify considering street usage, value and distribution methods of narcotics was fully established. The trial court did not err in refusing to declare a mistrial when it appeared that one juror had neglected to disclose that her husband had been a police officer years earlier and that another juror had dated one of the less important government witnesses in years past. In this respect the court was careful to inquire into the possibility of prejudice to the defendant and found none. There was no error in the court's refusal to instruct the jury concerning circumstantial evidence in the manner requested by counsel for the defense. In short, no error intervened in the case to deny the defendant a fair trial.

Accordingly, we affirm the convictions for counts 1 and 2 and the sentence for count 2. The case is remanded to the district court with instructions to vacate the sentence under count 1 and the convictions and sentences under counts 3 and 4.

APPENDIX B

ORDER DENYING PETITION FOR REHEARING

(United States Court of Appeals — Sixth Circuit)

(Filed February 15, 1978)

Before: PHILLIPS, Chief Judge; ENGEL, Circuit Judge, and LAMBROS, District Judge.*

Appellant having filed a petition for rehearing with this court, and this court having considered said petition and being duly advised in the premises,

IT IS ORDERED that the petition for rehearing be and it is hereby denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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* Hon. Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.